

the FCC staff. Considering that Kay was not disregarding the processes, the Judge's actions were clearly erroneous.

49. Consistent with the arguments presented on Interrogatory No. 4, the Judge had no grounds to revoke Kay's licenses based on Kay's actions in response to the 308(b) Request. A review of the applicable law reveals that the Commission has never revoked the license of a party that was not in willful violation of the statute. The cases relied on by the Judge are not to the contrary. Warren L. Percival, 8 FCC 2d 333 (1967), involved a licensee that failed to respond in any fashion whatsoever to an order to show cause. Carol Music, 37 FCC 379 (1964), dealt with the revocation of a license, after hearing, on the basis of an absolute refusal to tender requested information. The Bureau did not establish, in any regard, such a willful action on Kay's part.

50. Turning to the merits, the Section 308(b) issue involves a January 31, 1994¹⁵ request from the Bureau to Kay to produce his customer list. Upon receiving this request, Kay was concerned that the purpose of this request was not to secure information on his operations for enforcement purposes, but to have it in Commission files where competitors could secure the

¹⁵ The Judge's conclusion that "Kay has willfully violated and since January 31, 1994, has been in continuous violation of § 308(b) of the Communications Act of 1934, as amended . . ." (S.D 19) is, in itself, clearly erroneous as Kay had, by the terms of the letter, sixty (60) days in which to respond plus several extensions.

information and use it for their own purposes.¹⁶ Kay asked the Bureau to treat his customer lists as confidential. See April 7, 1994 letter from Brown & Schwaninger to W. Riley Hollingsworth, attached as Attachment 2 to the Motion. When such confidentiality was refused, Kay chose the only procedure available to a licensee to challenge what the licensee deemed an impermissible act on the part of the staff: to withhold a response.

51. Kay was not in any manner willfully disregarding an information request. Kay possessed a legitimate concern as to the information requested and sought to negotiate a compromise. Being unable to secure an agreement with the Commission, Kay was faced with the options of turning over confidential business information or challenging the Bureau's decision as to the propriety and necessity for securing such information.

52. The Bureau's decision to seek revocation based on a challenge to the 308(b) Request is erroneous. The Bureau should have issued an Order to Show Cause which would have allowed Kay to respond and the matter to be considered in due course, by the Bureau, the Commission, and the courts. To find that a party which has a substantial concern over an information request guilty of an offense warranting revocation is erroneous; it elevates Section 308(b) violations above all others. In other areas, rule violations are dealt with pursuant to Section 1.89,

¹⁶ Kay's concerns were well-founded as the 308(b) Request was sent by blind copy to six of Kay's competitors.

which allows a party to explain its actions in response to a Notice of Apparent Liability and have the violation considered administratively and judicially. The Commission has yet to explain why this matter was treated differently.

53. As for Kay's own actions, he has never willfully acted to violate the Commission's rules. After the HDO was issued, Kay again requested and received from the Judge a protective order¹⁷ that assured confidentiality for the documents. See Pg. 7 of Kay's Declaration attached to his Supplemental Opposition, filed on March 15, 1996. Kay immediately tendered the requested information, involving over 36,000 documents. This is sufficient evidence that Kay did not deliberately withhold information from the Bureau; instead, Kay was attempting to secure an elemental protection for confidential business information that the Commission was providing other parties.

54. There is absolutely no basis for summary decision. There exists a genuine issue of material fact as to whether Kay willfully withheld documents or merely sought to protect confidential business information. The Judge's conclusion to the contrary is not supported by the evidence and is directly contradicted by Kay's own sworn testimony.¹⁸

¹⁷ As indicated supra, the Commission has provided parties protective orders. Had this treatment been granted to Kay, Kay would have earlier delivered the requested information. Why wasn't Kay accorded such treatment?

¹⁸ See, Telephone and Data Systems, Inc., 10 FCC Rcd 10518, 10536 (1995) ("The absence of deceptive intent may be established by uncontradicted affidavits and sworn testimony of the principals whose candor is in question.")

E. THERE SHOULD BE NO FORFEITURE

55. The Judge, showing his deep rooted animosity for Kay, has also set a forfeiture (S.D. 19). Even the Bureau, when offered the opportunity to address forfeiture, stated that it had not considered the issue (Tr. 151). The Judge's determination of a forfeiture was both improper and excessive.

56. As indicated in the HDO (§ 19), any forfeiture requires a finding that the actions of the licensee were "willful and/or repeated." In the S.D., the Judge makes absolutely no finding that any willful or repeated violations were committed. All that the Judge found, without record support, is that Kay committed "stonewalling and abusive conduct" in connection with the disclosure of information in response to Section 308(b).

57. As established supra, Kay did not intentionally withhold any information, let alone "stonewall" or act in an "abusive" manner. Kay requested a sincere confidentiality arrangement that the Bureau accorded to others. Why that could not be provided to Kay is yet another mystery of this case. Absent adequate confidentiality protection, Kay had no choice but to litigate the relevancy of the Commission's request for confidential business information. Given the Commission's stated concern over the treatment of confidential business information (n. 1, supra), this was a justifiable action.

58. The forfeiture levied herein is without any substantive basis. Kay did not act in a willful or repeated way to violate the Commission's Rules. There is no basis for a forfeiture.¹⁹

V. CONCLUSION

The S.D. is replete with errors of and evidence not supported by the record. Instead of creating a full record upon which to determine whether Kay complied with the Bureau's request, the Judge relied on the unsworn testimony of biased and unqualified "witnesses." Instead of examining the record concerning Kay's failure to respond to the 308(b) Request and Interrogatory No. 4, the Judge erroneously determined that Kay willfully refused to comply with the Bureau's request. An examination of the facts and law reveals, instead, that Kay was not obligated to maintain historical loading information pursuant to the Commission's own rules and fully responded to the Bureau's request. The S.D. must be reversed and remanded. Given the prejudgment of the case by the Judge, the remand should include a specific instruction that the Chief Administrative Law Judge appoint another Judge to preside over the matter so that the hearing is an impartial and fair one.

¹⁹ Additionally, the Presiding Judge refers, at S.D. 19, n. 20, to Commission's Forfeiture Policy Statement, 10 FCC Rcd. 2945 (1995). This is merely a Notice of Proposed Rule Making. Examining the Guidelines found therein, the base forfeiture for wireless licensees, involved in failures to respond to Commission communications, is \$4,000.00. The upward adjustment for egregious conduct is from 50-90%. The Presiding Judge's \$75,000.00 figure is patently incorrect.

Respectfully submitted,

JAMES A. KAY, JR.

By: Bruce Aitken
Bruce Aitken
Martin J. Lewin

Aitken, Irvin, Lewin,
Berlin, Vrooman & Cohn
1709 N Street, N.W.
Washington, D.C. 20036
(202) 331-8045

By: Scott A. Fenske
Barry A. Friedman
Scott A. Fenske

Thompson Hine & Flory P.L.L.
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800

Dated: July 1, 1996

CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the foregoing James A. Kay Jr.'s Consolidated Brief and Exceptions was hand-delivered on this 1st day of July, 1996 to the following:

Gary P. Schonman, Esquire
Federal Communications Commission
Hearing Branch
Mass Media Bureau
Suite 7212
2025 M Street, N.W.
Washington, D.C. 20554;

John I. Riffer, Esquire
Assistant General Counsel
Office of General Counsel
Federal Communications Commission
Room 610
1919 M Street, N.W.
Washington, D.C. 20554

and sent via first-class mail, postage prepaid on this 1st day of July, 1996 to:

W. Riley Hollingsworth, Esquire
Deputy Associates Bureau Chief
Wireless Telecommunications Bureau
1270 Fairfield Road
Gettysburg, Pennsylvania 17325-7245



Scott A. Fenske